In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No.

LAWRENCE J. ROGGE and EUGENE ROGGE, copartners, doing business under the firm name and style of Sourdough Express, WILLIAM MILLER and MAX MILLER, copartners doing business under the firm name and style of General Transportation Company, ALFRED GHEZZI, JR., BYRON GLEN ROBERTS, CLYDE GORDON, RICHARD ZEHNDER, and MORT CASS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

We deem it unnecessary to repeat the statement of the cause made in the foregoing Petition. In this

brief, we will recapitulate the legal points relied upon and cite cases in their support.

The Richardson Highway, before the promulgation of the regulation by the Secretary in 1935, was a free public highway (R. 4). It was established during the gold rush to Fairbanks in 1902-1903. It belongs to the people of Alaska, under Section 2477, Rev. Stat. of the United States (43 U. S. C. A. Sec. 932, p. 216). They are its proprietors. It does not belong to the United States. The only control that the United States has over it is by virtue of its sovereignty—as a state.

Gordon v. Nash, 9 Alaska 701;
Opinion of District Court (R. 16-27).

TOLL ROADS CAN ONLY BE CREATED BY LEGISLATIVE GRANT.

The right to construct and operate *toll roads* is not a common right and does not exist in the absence of legislative grant. *Before a free public highway can be converted into a toll road, authority to do so must be granted in terms.* There is no act of Congress that invests the Secretary of the Interior with power to convert a free public highway into a toll road in Alaska.

65 *C. J.* 1127, Sec. 7;
12 *R. C. L.* 1402;
Blood v. Woods (Cal.), 30 Pac. 129, 131;
El Dorado Co. v. Davison, 30 Cal. 521, 524;
Peru Turnpike Co. v. Peru, 100 A. 679;

Geiger v. President etc., 31 A. 918, 28 L. R. A. 458;

Virginia etc. v. People (Colo.), 45 Pac. 398, 37 L. R. A. 711;

Elliott's Roads & Streets (4 ed.), Secs. 96, 98;

City of Oakland v. E. K. Wood Lumber Co. (Cal.), 292 Pac. 1076.

The only legislation that authorizes the construction and operation of *toll roads* in Alaska is the Act of May 14, 1898 (48 U. S. C. A. 416). This Act authorizes the Secretary of the Interior to issue permits to private persons for the construction of toll roads over public lands. *The Act makes it a misdemeanor* for any person, company, or corporation to collect or attempt to collect tolls, except under the provisions thereof (Compiled Laws of Alaska, 1933, Sec. 191). The Act of 1932 does not authorize the Secretary to convert free public roads into toll roads, neither does it authorize him to impose tolls for the privilege of transporting freight and merchandise over the public roads of Alaska.

The only authority conferred upon him by the Act is to *"make rules and regulations"*. The object and purpose of the rules and regulations are to regulate the use of roads "including the fixing and collection of tolls".

The meaning of the language, "fixing and collection of tolls", is plain and clear and needs no construction.

Word "Tolls" defined.

The word "tolls", when applied to roads, has a well-defined meaning. In its common acceptance, it has been defined, by this Court, as "a proprietor's charge for passage over a highway or bridge exacted when and as the privilege of passage is exercised".

Carley and Hamilton v. Snook, 281 U. S. 66, 73-74.

Cooley on Taxation (4 ed.) Sec. 14 defines "tolls", as now understood, as being:

> "* * * charges for the permission to pass over a bridge, road or ferry *owned by the person imposing them.* Tolls are not taxes. A tax is a demand of sovereignty; a toll is a demand of proprietorship."
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> *St. Louis v. W. U. Tel. Co.,* 148 U. S. 92, 37 L. ed. 380;
>
> *State Freight Tax,* 15 Wallace, 232, 278, 21 L. ed. 146;
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> *Elliott's Roads and Streets* (4 ed.), Sec. 95;
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> 62 *C. J.* 1077-1079;
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> *Anthony v. Kozer* (D. C. Ore.), 11 F. (2d) 641, 645.

MEANING OF THE WORDS "FIXING AND COLLECTION OF TOLLS".

To "fix" a toll is to establish a definite rate of pay for passage over a road open to the public.

To make *"rules and regulations"* fixing tolls is to prescribe a rate by which it is to be determined.

Anderson's Law Dictionary, p. 186;

Morse v. Delaney, 218 N. Y. S. 576;
Flagg v. Columbia (Ore.), 94 Pac. 184;
Cricket v. State of Ohio, 18 Ohio St. 9;
Commonwealth v. Rose (Va.), 168 S. E. 356.

To make rules and regulations for the collection of tolls is to prescribe how and where the tolls are to be demanded and paid (Webster's Dictionary).

The words of the act being plain, they must be given the meaning naturally attributable to them. *The language being clear, it is conclusive.*

U. S. v. Resnick, 299 U. S. 208, 210;
Osaka Shosen Kaisha v. U. S., 300 U. S. 98, 101;
Old Colony T. Co. v. Commissioner, 301 U. S. 379, 383;
Jeu Jo Wan v. Nagle (9 C. C. A.), 9 F. (2) 310;
Northern Commercial Co. v. U. S. (9 C. C. A.), 217 Fed. 33;
Banco Mexicano etc. v. Deutsch Bank, 289 Fed. 924, 928.

WORDS OF ACT BEING PLAIN, ITS LEGISLATIVE HISTORY CANNOT BE CONSIDERED BY THE COURT IN INTERPRETING IT.

The Circuit Court of Appeals has disregarded the plain words of the Act. In order to uphold the regulation, it has read into the Act the report of one House of Congress, namely the report of the Senate Committee on Commerce in reporting this regulation. This

the Court had not the right to do, as the decisions of this Court have repeatedly determined (cases cited immediately above).

Furthermore, the Circuit Court of Appeals, in considering the report of only one House of Congress, has disregarded its own decision in *U. S. v. Lindsly,* 7 F. (2) 247, 251, 252, where it said:

> "Such a statement by the committee of one house—never probably made known to the other house, and possibly not even known to the general membership of that house itself—*cannot be a guide to the interpretation of clear language, and cannot justify an interpretation that means the repeal and rejection of what has been recognized for centuries as the general law* * * *" (Emphasis supplied).

ACT OF JUNE 30, 1932, TO BE STRICTLY CONSTRUED.

The Circuit Court of Appeals, in holding, that the Act authorizes the Secretary: (a) to convert a free public road into a toll road and to operate it as such; and (b) to impose tolls on freight and merchandise that is transported over the Highway in competition with the Alaska Railroad; has disregarded the established law and the applicable decisions of this Court that declare *that statutes imposing tolls for the use of free public roads are against common right and must be strictly construed.*

65 *C. J.* 1144, Sec. 34; 1127, Sec. 7; 1167, Sec. 66;

Elliott's R. and Sts. (4 ed.), 96.

In *Peru Turnpike Co. v. Town of Peru* (Vt.), 100 A. 679, 680, the Court said:

> "'Whoever seeks to impose tolls must support his claim by plain words', said the Lord Chief Justice in Portsmouth Bridge Co. v. Nance, 46 E. C. L. 227. * * *
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> The rule governing the construction of such grants is thus stated in the cases:
>
> 'Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation and doubt is fatal to the claim. This doctrine is vital to the public welfare.' Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 649, 24 L. ed. 1036.
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> 'Nothing passes but what is granted in clear and explicit terms * * * whatever is not unequivocally granted in such acts is taken to be withheld.' (Holyoke Water Power Co. v. Lyman, 15 Wall. 500; People v. Newton, 112 N. Y. 396."

In view of the plain language of the Act, and the rule of construction applicable to its interpretation, we are unable to comprehend how the Circuit Court of Appeals could hold that:

> "From these statements it is apparent that the Act was designed to eliminate the highway competition so that the railroad would no longer be jeopardized, and to accomplish this purpose Congress authorized the Secretary *to impose tolls upon the highway.*"

There is a marked distinction between the words "impose" and "fix".

We have already pointed out that to fix a toll is to establish its rate. The Century Dictionary gives some of the meanings of the words "to impose" as follows:

> "To lay as a burden; to levy, inflict, or enforce, as by authority, power, or influence; as to impose taxes or penalties."

How is it possible to construe the word "fix" as giving the power to impose? Furthermore:

> "If Congress had this intention, it could have been expressed in the Act; but, inasmuch as no such intention can be drawn from the language of the Act, we are not authorized, from the mere statement contained in the report of the committee either to read such an inference into the Act or to presume such an intent in Congress."
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> *Banco Mexicano etc. v. Deutsch Bank,* 289 Fed. 924, 928, Par. 3.

CHARGE IMPOSED NOT A TOLL BUT A PENALTY.

The charge imposed by the Regulation is not a toll. It is a penalty, to suppress competition. *It is not a charge for passage over the Highway, but a charge to inhibit its use north of the Tanana River.*

The Regulation has established a line adjacent to the McCarty Ferry, where the Toll Station has been established. No merchandise or freight destined for Fairbanks or vicinity is permitted to cross this line, without first paying the charges imposed by the Regulation. The Toll Station is in reality a *customs house* and the line a tariff wall.

This line arbitrarily divides that portion of Alaska served by the Richardson Highway into two parts. Within the limits of either of these parts, freight can be transported free of all tolls. It is only when merchandise or freight crosses the line that the charge imposed by the Regulation is demanded and collected. It is therefore obvious that the so-called "toll" is not imposed for *the privilege of passage over the Highway, but solely for the purpose of inhibiting the transportation of freight in competition with the Railroad.*

The Regulation is not one authorized by the Act. It is a regulation in restraint of commerce, to destroy competition in order to create a monopoly in the Alaska Railroad.

This Court, in *Sands v. Manistee River Imp. Co.*, 123 U. S. 288, 31 L. ed. 151, said:

> "* * * Tolls are the compensation for the use of another's property, or of improvements made by him; and their amount is determined by the cost of the property, or of the improvements, and considerations of return which such values or expenditures should yield."

In view of the foregoing language, and of the limited power delegated to the Secretary of the Interior by the Act of June 30, 1932, we are at a loss to understand how the Circuit Court of Appeals can say, that:

> "Nor do we agree that the regulation was a tax or penalty on haulers of freight and therefore not the toll authorized by the Act. * * *

"The fact that Congress had for one of its purposes the elimination of competition and not the promotion of the highway, *is in no way material,* for Congress has plenary power over territories. Binns v. United States, 194 U. S. 486." (Emphasis supplied.)

TOLL IMPOSED IS A PENALTY TO INHIBIT AND SUPPRESS THE VERY THING TAXED FOR THE ULTERIOR PURPOSE OF CREATING A MONOPOLY IN THE ALASKA RAILROAD.

The Regulation is for one purpose only, namely: the elimination of competition. To accomplish this purpose, a charge so oppressive is imposed that it operates as a penalty. The charge is not for the purpose of *collecting revenue in order to pay for the cost of the road, the improvements thereon, and a return upon the investment—the object and purpose of all tolls*—but its sole aim is to destroy—to kill—the very thing taxed, *for the ulterior purpose of Regulating Commerce by restraining trade in order to create a monopoly in the Alaska Railroad.* Such an *abuse* of the taxing power of Congress has been repeatedly condemned by this Court.

Child Labor Tax Case, 259 U. S. 20, 66 L. ed. 817;

Hill v. Wallace, 259 U. S. 44, 66 L. ed. 822;

Trusler v. Crooks, 269 U. S. 475, 77 L. ed. 365;

U. S. v. Butler, 297 U. S. 1, 80 L. ed. 477;

Carter v. Carter Coal Co., 298 U. S. 238, 80 L. ed. 1160;

Hume-Sinclair Coal Min. Co. v. Nee, 12 F. Suppl. 801.

REGULATION IS A REGULATION OF INTERSTATE COMMERCE.

The reach of the Regulation is far beyond the scope of the Act, and far into a realm that is solely within the jurisdiction of Congress. It is a Regulation of Interstate Commerce. The power to regulate interstate commerce is conferred exclusively upon Congress, and is jealously guarded. *Congress did not delegate this power to the Secretary of the Interior by an Act that only authorizes him to make Rules and Regulations governing the use of roads—including the fixing and collection of tolls.*

ACT OF JUNE 30, 1932, IN PARI MATERIA WITH THE ACT OF 1898.

Unless the Act of 1932 is construed *in pari materia* with the Act of 1898, then it must be declared void, as being indefinite and incomplete. The Act contains no provision for the creation of toll roads; it does not authorize the levy of tolls; it does not specify by whom a toll road is to be operated; it does not specify the persons or things that shall be subject to tolls, nor who is to be the recipient or beneficiary thereof; nor what disposition is to be made of it. There is *no subject matter upon which the rules and regulations, that the Secretary is authorized to make, can operate.*

UNITED STATES WITHOUT RIGHT TO SUE OR COLLECT FOR TOLLS.

Under the rule of strict construction that must govern the Act under consideration, how can it be said: That the United States has the right to demand, collect and sue for the tolls here involved? The Act does not grant tolls to the United States or to anyone else. We are unable to understand upon what principle the United States predicates its right to sue for and collect tolls from the petitioners. Is it because of its sovereignty? Although we have repeatedly asked this question, it has not as yet been answered by the respondent, nor by the Circuit Court of Appeals.

Tolls, like taxes, must in every instance be appropriated by Congress. This principle is fundamental. It is one of the chief cornerstones of our constitutional form of government.

It is respectfully submitted that this Writ of Certiorari should be issued so that the judgment of the United States Circuit Court of Appeals, Ninth Circuit, may be reversed by this Honorable Court.

Dated, San Francisco, California,
July 27, 1942.

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